SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted]25

J. C. FAIRLEY, ET AL.,
Appellants,
vs.
JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,
vs.
JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a) and 1(c) of the Rules of this Court, Joe T. Patterson, et al., Appellees, move that the appeal be dismissed, or, alternatively, that the Judgment of the District Court be affirmed.

QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In finding that Section 2870 of the Mississippi Code, as amended by the 1966 Session of the Mississippi Legislature does not come within the purview of and is not covered by Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c) for convenience hereinafter referred to as Section 5, so as to require compliance with Section 5 by the State of Mississippi and the Appellee Counties involved in each of the cases consolidated on this appeal, prior to enforcing or applying Section 2870 of the Mississippi Code, as amended; and

(b) In dismissing each of the Complaints of the Appellants, thereby denying the relief requested by the Appellants in each of the consolidated cases.

2. Whether, the November 7, 1967 General Election in each of the Counties appearing herein as Appellees having been held in accordance with Section 2870, as amended (i.e., election at large for County Boards of Supervisors rather than election by Districts), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 was applicable, should order a new election of such County Boards of Supervisors pursuant to the provisions of Section 2870 of the Mississippi Code prior to its amendment by the 1966 Session of the Mississippi Legislature.

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code.

Section 170 of the Mississippi Constitution of 1890 provides:

> "Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law,* and the five so chosen shall constitute the Board of Supervisors of the county, a majority of whom may transact business." (Emphasis added)

Prior to May 27, 1966, each of the Members of the Boards of Supervisors in each of the Counties of Mississippi, including the Appellees, Adams and Forrest Counties, were elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Section 170 of the Constitution of Mississippi of 1890.

Pursuant to the authority granted the Legislature of Mississippi by Section 170 of the Mississippi Constitution of 1890, effective May 27, 1966, the Legislature of Mississippi amended Section 2870 to provide that Members of the County Board of Supervisors could, at each county's option, be elected at large on a county-wide basis by all qualified electors of the County, and, in good faith, the legislative amendment mandatorily required that if 20% of the qualified electors of the County shall present to the Board of Supervisors a petition objecting to such alternative method within sixty days after the adoption and final publication of any such alternative method, then the Board of Supervisors must call an election, after due notice provided, and the question on the ballot shall be whether the members of the Board of Supervisors shall be elected at large or by districts. The actions of the Appellees, Adams and Forrest Counties, in adopting the "at large" method of election of their Supervisors completely com-

plies with the "one-man, one-vote" mandate of this Court. Moreover, the legislative purpose in adopting the amendment of 1966 was to allow the several counties a method of complying with the mandate of this Court of "one-man, one-vote."

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 2870 of the Mississippi Code, and the action taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent and further charged said actions prevented the election of Negro candidates to the County Boards of Supervisors and that the said actions deterred potential Negro candidates from running for the Office of County Supervisor in said Counties. This second claim was *dismissed upon the voluntary Petition For Dismissal of the Appellants.*

ARGUMENT

I.

Section 2870 of the Mississippi Code As Amended by the 1966 Session of the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Supervisor and the other class represents the individual voters who cast their votes in the elections for Boards of Supervisors. As to the class representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between

Representative Corman and the Honorable Burke Marshall found at Page 74 of the Hearings before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H.R. 6400, Serial No. 2 and here set out for the convenience of the Court forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 2870, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c). The Voting Rights Act of 1965 is entitled: "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of

the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U.S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals are *not prohibited from voting.*" (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. More relevant to the construction of a Federal Statute is the very language which Congress has expressed its policy and from which the Court must extract the meaning more appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words "qualification", "prerequisite", "standard", "practice", or "procedure", five different times. They do, in each instance where they are used, refer only to "voting" which is defined in the Act by Section 14c thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be casted, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice", or "procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis,' that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words from the company they keep are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 2870 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with with the method by which the Supervisors of a County will be elected. Determination of the method by which the vote is to be taken is a matter within the inherent and exclusive jurisdicion of the States and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 791, 86 S.Ct. 803, 822, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C.A. 1973c). This Section contains the proviso that in the event a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or in effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively, or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as "to yield, accommodate, or to adapt one's self to, to act in accordance with." We suggest to the Court that the use of the word "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 2870 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964, except to permit a person to cast a vote for four additional candidates for the Board of Supervisors of the County in which the person resides.

This mechanism in the Act whereby a person has the right to vote without complying with a voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1964, in truth and in fact, contemplates a new obstacle placed in the path of an individual in the voting procedure and allows that individual to cast his vote, have it counted and included in the appropriate totals of votes casted with respect to candidates and propositions without *complying* with said new procedure. Section 2870, Mississippi Code, as amended, does not concern itself with any act which a person could refuse to *comply* with before voting and the procedure incident thereto.

An application of the plain and unambiguous language of the Act of Congress to the amendment now in question makes it clear that this amendment is not covered by or within the purview of the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 2870, as amended, of the Mississippi Code.

On Page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to

a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.
>
> It occurred to us that there are other ways in which states can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.
>
> This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, Sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with

giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added).

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

> "FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices, or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with

the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the right to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 2870, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A., Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under Section 1973b(a) of 42 U.S.C.A. This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures" only those acts

of a State or a political subdivision thereof which would discriminate as to the exercise of the right to vote because of his race or color.

At Page 16 of Appellants' Brief filed with this Court Appellants state that:

> "[E]arlier in the hearing, he [Mr. Katzenbach] gave examples of changes which would not be covered [by 42 U.S.C.A. 1973c]—changes in voting age, resident requirements, and balloting procedures such as changing from paper ballots to machine * * *."

Surely, if as Appellants contend in their Brief, these changes are not within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c), then Section 2870, Mississippi Code 1942, as amended, could not conceivably fall within the purview of said Section 5 of the Act.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach,* supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Section 2870, Mississippi Code 1942, as amended, in no way denies or abridges the right of Appellants to vote because of race or color as prohibited by the Fifteenth Amendment to the Constitution of the United States. In response to the teachings of *Baker* v. *Carr,* 369 U.S. 186, 9 L.Ed.2d 663, 82 S.Ct. 691, and *Reynolds* v. *Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, and their progeny, the Mississippi Legislature during its regular session of 1966, exercising its legislative wisdom under and by virtue of Section 170

of the Mississippi Constitution of 1890, amended Section 2870 of the Mississippi Code of 1942. Although this Court had not at that time held that a County political subdivision was compelled under the equal protection clause to redistrict itself on an equal basis, the United States District Courts of Mississippi have held that such was portended by such teachings of this Court.

The adoption of Orders by the Adams and Forrest Counties Boards of Supervisors whereby the Members of said Boards were to be voted upon by the electorate of each County at large brought these Counties within the ambit of the rationale of *Baker* v. *Carr,* supra, and *Reynolds* v. *Sims,* supra. The rule of "one-man, one-vote," is now a reality in the Counties of Adams and Forrest.

Appellants' right to vote has in no way been denied or abridged by the actions of the Appellees' Boards. Rather than having their votes diluted, as argued by the Appellants, the power of their votes has been increased. Whereas before a voter in a District only cast a vote for a candidate residing in his District under the present method of electing Members of the Boards of Supervisors of Adams and Forrest Counties the same voter cast a ballot for four additional candidates. Under the law of Mississippi the Board of Supervisors can only act as a unit, and then only when the Sheriff and Clerk of the Board are in attendance. (Section 2873, Mississippi Code 1942) This voter can now exert on and have his voting influence felt by not only one member of the Board of Supervisors, but on all five of the members. As stated by this Court in *Fortson* v. *Dorsey,* 379 U.S. 433, 13 L.Ed.2d 401, ... S.Ct. 498:

> "Each District's Senator must be a resident of that District, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interest

of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the District's Senator."

The Amendment to Section 2870, Mississippi Code 1942, authorizes changes in the method of electing Members to the Boards of Supervisors similar to changes which occur in legislative and congressional reapportionment.

The Congressional Redistricting Statute passed by the Mississippi Legislature effective during the 1966 Congressional election was held to be valid and constitutional by an unpublished opinion of the District Court and affirmed by this Court. *Connor, et al.* v. *Johnson, et al.*, No. 999 (1967) 386 U.S. 483, 18 L.Ed.2d 224, 87 S.Ct. 1175.

South Carolina v. *Katzenbach*, supra, stated with clarity that South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina and one county in Arizona had been brought within the coverage formula of the Voting Rights Act of 1965 on August 7, 1965. Subsequent to that time legislative apportionment and/or congressional redistricting have been before the Courts in each of those States. South Carolina—*O'Shields* v. *McNair*, 254 F. Supp. 708; Alaska—*Wade* v. *Nolan*, 414 P.2d 689; Georgia—*Tombs* v. *Fortson*, 241 F. Supp. 65, 16 L.Ed.2d 482, aff., 384 U.S. 210, 16 L.Ed.2d 482, 86 S.Ct. 1464 (May 16, 1966); Louisiana—*Bannister* v. *Davis*, 263 F. Supp. 202; Mississippi—*Connor* v. *Johnson*, supra; Virginia—*Mann* v. *Davis*, 245 F. Supp. 241, aff. 15 L.Ed.2d 35, 382 U.S. 42, 15 L.Ed.2d 35, 86 S.Ct. 181 (October 25, 1965); North Carolina—*Drum* v. *Seawell*, 249 F. Supp. 877, aff., 16 L.Ed.2d 298, 383 U.S. 831, 16 L.Ed.2d 298, 86 S.Ct. 1237 (April 4, 1966); and Arizona—*Klahr* v. *Goddard*, 250 F. Supp. 537.

Some of the cases as above noted were considered and reviewed by this Court. It is significant that such changes, both by the Legislatures of the States covered and the Courts of those States, were in total disregard of the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c). It is submitted that the reason for this is that such proscriptive provisions were not even thought to apply to these changes. This Court and the Members thereof were well aware of the Voting Rights Act of 1965 and the provisions of Section 5 thereof, having dealt with said Act in *South Carolina* v. *Katzenbach,* supra, decided March 7, 1966. Although this question was not presented in the aforementioned cases, under familar principles, the cases would have been decided on the basis of law controlling at the time the Court rendered its decisions, and therefore the provisions of Section 5 of the Voting Rights Act of 1965 would have been applicable to these litigations. *Foundries* v. *Tri-City Cent. Trades Council,* 257 U.S. 184, 66 L.Ed. 189, 42 S.Ct. 72. *United States* v. *Alabama,* 362 U.S. 602, 4 L.Ed.2d 982, 80 S.Ct. 924. Thus, this Court, in exercising jurisdiction in the above mentioned cases, sub silentio, *decided that changes in regard to congressional redistricting and legislative reapportionment were not within the purview of Section 5 of the Voting Rights Act of 1965.*

This Court approved a method of electing members of the City Council of Virginia Beach, Virginia, similar to the method of electing Members to the Boards of Supervisors of Adams and Forrest Counties. *Dusch, et al.* v. *Davis, et al.,* 18 L.Ed.2d 656. The method used by Virginia Beach, Virginia, was under a charter amendment enacted during the 1966 session of the Virginia State Legislature. Virginia, like Mississippi, is controlled by the proscriptive provision of Section 5 of the Voting Rights Act of 1965.

Virginia Beach, Virginia, did not submit the change in its method of electing city councilmen to the Attorney General of The United States nor did it have said method approved by the United States District Court for the District of Columbia. This plan, enacted after November 1, 1964, was approved by the United States District Court for the Eastern District of Virginia, disapproved by the United States Court of Appeals for the Fourth Circuit and then *approved by this Court in a decision dated May 22, 1967.*

If this change in the method of electing councilmen of Virginia Beach, Virginia, which is almost identical to the change adopted in Adams and Forrest Counties, Mississippi, comes within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c), then the United States District Court for the Eastern District of Virginia lacked jurisdiction to entertain this cause of action. Jurisdiction for the approval of a change in the voting procedure of a state or political subdivision, thereof, enacted or enforced after November 1, 1964, when said state or political subdivision is controlled by Section 5 of the Voting Rights Act of 1965, is in a court of three judges in the United States District Court for the District of Columbia only, as provided by the Act. This court would have lacked jurisdiction to entertain the appeal since the District Court lacked jurisdiction and, therefore, would have been compelled to dismiss the appeal upon the court's own motion; the court and the members thereof being well aware of the Voting Rights Act of 1965, and Section 5, thereof, having had said act before them in *South Carolina* v. *Katzenbach,* supra, decided March 7, 1966. We suggest to the Court that since this court was aware that Virginia was brought within the coverage formula of the act on August 7, 1965, in approving the Virginia Beach, Virginia change, this Court, sub silentio, found that such change did not come within the pur-

view of Section 5 of the Voting Rights Act of 1965. We further suggest to the court that since the change enacted in 1966 by the legislature of Virginia allowing Virginia Beach, Virginia, to elect seven members of its city councilmen at large, while requiring at least one member to reside in each of the seven boroughs, is perfectly analogous to Section 2870, Mississippi Code, as amended, by which the Legislature of Mississippi in 1966 allowed the Counties of Mississippi to provide that the five members of the county boards of supervisors be elected at large while requiring one member to reside in each of the five districts of the county. Therefore, we respectfully submit to the Court that Section 2870, Mississippi Code, as amended, and the actions taken thereunder, and pursuant thereto, by the counties of Adams and Forrest, appellees herein, do not come within the purview of, and are not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c).

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell,* 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily reveals that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c). This was a three judge court of Alabama, composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon

the grounds that: (1.)That portion of the act had an apparent discriminatory effect; and, (2.)That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A., Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect thereof was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c), admitted at page 918 of 253 F. Supp. that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that Section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

The action taken by the Alabama State Legislature is in no way similar to Section 2870 of the Mississippi Code, as amended, and the actions taken thereunder, and by virtue thereof, by the counties of Adams and Forrest.

In the event the appellants' position should be sustained, then the effect, thereof, would be to overrule the decisions of this Court pertaining to the "one man, one vote" rule in the cases previously before this Court originating in those states covered by the Voting Rights Act of 1965. Further, such holding would preclude any future litigation in the states covered by the Act as it pertains to complying with the mandates of this Court in reapportionment so as to have a truly representative form of government. To so hold would mean that the Congress, through the Voting Rights Act of 1965, has withdrawn from the local District Courts of the several states covered by Section 5 of the said Voting Rights Act jurisdiction to entertain such litigation by denying them the authority to approve or disapprove any actions taken by such states or political subdivisions, thereof, whereby said states or political subdivisions realign boundaries of voting districts so as to accommodate them to this Court's "one man, one vote" mandate.

Moreover, to sustain the appellants' position would prevent the realignment of school districts, sometimes necessary in order to comply with the school segregation case of *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 and *United States* v. *Jefferson County Board of Education*, 372 F.2d 836.

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school districts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce in-

dividual rights under the Fifteenth Amendment to the extent of defeating other rights guaranteed under the Fourteenth Amendment.

For this Court to dismiss or affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and asserting therein, invidious discrimination. *Dusch* v. *Davis*, 18 L.Ed.2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and that no substantial question on the merits has been raised or presented by the Jurisdictional Statement filed herein by the Appellants. Therefore, the Motion of Appellees to Dismiss the Appeal should be sustained or alternatively the Judgment of the District Court be affirmed.

Respectfully submitted,

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